

STATE OF MICHIGAN  
COURT OF APPEALS

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CONNIE ELIA, LOUIS ELIA, THERESA  
CIPRO, and ANDREA CIPRO,

UNPUBLISHED  
October 16, 2003

Plaintiffs-Appellants,

v

RICHARD V. HAZEN,

No. 238577  
Berrien Circuit Court  
LC No. 96-001298-NI

Defendant-Appellee.

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Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the trial court denying plaintiffs' request to tax additional expert witness fees following this Court's earlier opinion in this case, *Elia v Hazen*, 242 Mich App 374, 379-380; 619 NW2d 1 (2000), which held that plaintiffs were entitled to expert witness fees as taxable costs pursuant to MCR 2.403(O).<sup>1</sup> We affirm.

I

The underlying facts of this case are set forth in this Court's previous opinion as follows:

On September 9, 1995, the automobile in which plaintiffs were riding was struck in the rear by an automobile driven by defendant. Plaintiffs filed this automobile negligence action, alleging that the collision resulted in serious injury and impairment of bodily function. The case was mediated, and plaintiffs and defendant rejected the mediation evaluation. Following a jury trial, a verdict was rendered in favor of plaintiffs, and judgment was entered on the verdict. Thereafter, plaintiffs brought a motion for mediation sanctions in the form of actual costs and legal fees pursuant to MCR 2.403. The trial court ordered that

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<sup>1</sup> At the time of the lower court's decision in this case, the court rule provided for "mediation" sanctions, but has since been amended to refer to "case evaluation" rather than "mediation." Dean & Longhofer, Michigan Court Rules Practice, 2002 Pocket Part § 2403.1, p 36.

defendant pay plaintiffs' costs and legal fees. It included the \$19,389.16 cost of depositions that were read into the trial record, ruling that they were filed with the court clerk and used during trial in accordance with MCL 600.2549; MSA 27A.2549. However, the trial court denied plaintiffs' request for \$13,750.43 in expert witness fees, ruling that plaintiffs failed to comply with a pretrial order requiring that all expert witness fees be disclosed before the parties' settlement conference. [*Elia, supra* at 376.]

The previous panel held that the trial court erred in denying plaintiffs' request for expert witness fees. *Id.* at 380. Noting that under MCR 2.403(O)(1) the award of costs was mandatory, the panel held that the trial court lacked discretion to refuse to award expert witness fees on the ground that there was noncompliance with the terms set forth in the pretrial scheduling order. *Elia, supra* at 380-381. The panel remanded the case for further proceedings, stating, "plaintiffs are entitled to provable expert witness fees on remand." *Id.* at 380.

## II

At issue in this subsequent appeal is plaintiffs' request for expert witness fees following remand. On remand in October 2000, plaintiffs filed a motion, requesting \$32,495.32<sup>2</sup> in expert witness fees and interest, rather than the \$13,750.43 requested in their 1998 motion for costs, *Elia, supra* at 376. According to plaintiffs' counsel, the initial calculation of expert witness fees was erroneous essentially because counsel had not gathered all the invoices, canceled checks, and letters of payment when he prepared the original proposed bill of costs.

The trial court granted plaintiffs' request for the \$13,750.43 sought in their original submission of costs, but denied plaintiffs' request for the additional expert witness fees. The court noted that pursuant to MCR 2.403(O)(8), a request for mediation sanctions must be filed within twenty-eight days and therefore the additional costs were not timely requested. The court found nothing in this Court's opinion remanding the case that obviated the necessity of an appropriate filing within the time requirements set forth in the court rule.

## III

Plaintiffs claim that the trial court erred in limiting their request for expert witness fees to the incomplete and erroneous proposed bill of costs previously submitted. Plaintiffs argue that pursuant to this Court's earlier opinion, stating that "plaintiffs are entitled to provable expert witness fees on remand," *id.* at 380, they were entitled to a hearing in the trial court on remand wherein they could present a full and complete record of all expert witness costs. We disagree.

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<sup>2</sup> In the August 2000 motion, plaintiffs sought \$30,061.10 in expert witness fees and interest, but at the time of the November 2001 hearing on the motion, plaintiffs were requesting \$32,495.32.

A trial court's decision to award mediation sanctions is a question of law reviewed de novo. *Id.* at 376-377. However, we review a court's decision regarding the amount of an award for an abuse of discretion. *Id.* at 377.

A request for costs under MCR 2.403(O) must be timely filed. *Brown v Gainey Transportation Services, Inc.*, 256 Mich App 380, 382-385; 663 NW2d 519 (2003). MCR 2.403(O)(8) provides:

A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

The issue before the previous panel was whether the trial court erred in denying plaintiffs' request for expert witness fees of \$13,750.43 as mediation sanctions. *Elia, supra* at 376. The panel found error, concluding that expert witness fees were part of the actual costs properly awarded as mediation sanctions pursuant to MCR 2.403(O). *Elia, supra* at 379-380. The panel therefore held that the trial court's denial of expert witness fees as a matter of law was error. *Id.* at 380.

Clearly, the previous panel recognized that the question of the amount of expert witness fees to which plaintiffs were entitled was not reached by the trial court and therefore was properly to be decided on remand. Considered in the context of the issue on appeal, the panel's statement that plaintiffs were entitled to "provable expert witness fees" reflected its recognition that the award of the requested fees was subject to proof. In an award of costs under MCR 2.403(O), a claimant seeking fees has the burden of proving those fees. *Campbell v Sullins*, 257 Mich App 179, 198, 201; 667 NW2d 887 (2003). We find nothing in the previous opinion or in the issue presented to the panel that supports a conclusion that the word "provable" was used with any intent other than that the matter of proof remained with respect to the originally requested expert witness fees.

Plaintiffs cite no authority or legal principle to support their claim that the time limits of MCR 2.403(O)(8) do not apply to their request for additional expert witness fees. Plaintiffs conceded at the November 2001 hearing that had the trial court granted their initial request for expert witness fees of \$13,750.43, they would be limited to that amount. That is, their supplemental request for additional fees would be improper because they would have been limited to the amount initially requested. Plaintiffs' argument that this Court's previous opinion, *Elia, supra*, or the interim appeal, in some way legitimizes their supplemental request for expert witness fees must fail absent some reasoned analysis beyond mere speculation concerning the previous panel's intent in the use of the word "provable." An appellant may not give issues cursory treatment with little or no citation of supporting authority and leave it to this Court to search for authority to sustain or reject his position. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Our decision is limited to the facts and circumstances of this case. We find no abuse of discretion in the trial court's award of only the \$13,750.43 expert witness fees presented in plaintiffs' submission of costs before first appeal, *Elia, supra* at 376.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Christopher M. Murray